Supreme Court, U.S.
FILED
DEC 12 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-508

In the Supreme Court of the United States

OCTOBER TERM, 1985

ARTHUR B. AVERY, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

JANIS KOCKRITZ
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether remarks made during the prosecutor's rebuttal argument constituted harmless error.

2. Whether a perjury count on which petitioner was acquitted was properly joined with other counts of the indictment under Fed. R. Crim. P. 8(b).

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Argument 4

Conclusion 6

TABLE OF AUTHORITIES

Cases:

Bruton v. *United States*, 391 U.S. 123 ..... 3, 5

Schaffer v. *United States*, 362 U.S. 511 6

United States v. *Bibby*, 752 F.2d 1116, petitions for cert. pending, Nos. 84-1692 and 84-1851 6

United States v. *Bryant*, 770 F.2d 1283 4

United States v. *Dorr*, 636 F.2d 117 5

United States v. *Duzac*, 622 F.2d 911, cert. denied, 449 U.S. 1012 5

United States v. *Jamar*, 561 F.2d 1103 5-6

United States v. *Lane*, No. 84-744 (argued Oct. 9, 1985) 6

United States v. *O'Connell*, 703 F.2d 645 5

United States v. *Seidel*, 620 F.2d 1006 6

United States v. *Swafford*, 766 F.2d 426 5

United States v. *Young*, No. 83-469 (Feb. 20, 1985) 4

Page

Statutes and rules:

Travel Act, 18 U.S.C. 1952 2
18 U.S.C. 1623 2
21 U.S.C. 841(a)(1) 2
21 U.S.C. 846 2
Fed. R. Crim. P. :
Rule 8 2
Rule 8(b) 4, 5
Rule 14 2

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-508

ARTHUR B. AVERY, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The initial opinion of the court of appeals (Pet. App. A1-A10) is reported at 760 F.2d 1219. The opinion of the court of appeals on denial of rehearing (Pet. App. B1-B2) is reported at 767 F.2d 1494.

JURISDICTION

The judgment of the court of appeals was entered on May 21, 1985, and a petition for rehearing was denied on August 12, 1985 (Pet. App. B1-B2). The petition for a writ of certiorari was filed on September 24, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner and co-defendant Alisa Avery were convicted on one count of conspiring to distribute controlled substances, in violation

of 21 U.S.C. 841(a)(1) and 846, two counts of traveling and using facilities in interstate commerce in connection with their illegal business enterprise, in violation of the Travel Act, 18 U.S.C. 1952, and one count of possessing cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1). Petitioner was acquitted on one count of perjury, in violation of 18 U.S.C. 1623. He was sentenced to eight years' imprisonment on the conspiracy count, a suspended sentence and two years' probation on each of the Travel Act counts, and a concurrent term of eight years' imprisonment on the possession count, to be followed by a three-year special parole term. In addition, petitioner was directed to contribute $10,000 to Dacco, Inc. The court of appeals affirmed petitioner's convictions and reversed those of Alisa Avery. Pet. App. A1-A10, B1-B2.

1. Prior to trial, the district court denied petitioner's motion under Fed. R. Crim. P. 8 and 14 to sever a count of the indictment charging him with perjury before a grand jury investigating his activities and those of his daughter, co-defendant Alisa Avery.[1] The evidence at trial, the sufficiency of which is not in dispute, showed that petitioner and his daughter conspired with Tracy Winn and Frederick Schneider to distribute large quantities of cocaine in Tampa, Florida and Cleveland, Ohio.[2] Petitioner was the source for the cocaine. Alisa Avery worked as the middleman, distributing the drug to lower-level distributors such as Winn and Schneider and collecting payments from them. Winn and Schneider dealt directly with petitioner as well as

---

[1]The district court ordered the severance of another perjury count, as to which petitioner stated that he would testify on his own behalf. Pet. App. A4.

[2]Prior to trial, Winn and Schneider entered into plea agreements with the government. Each testified for the government at trial.

with Alisa Avery. Pet. App. A4; III R. 93-98, 100-109, 111-116, 120, 126-135, 143-145; IV R. 13-26, 44-47, 66-71, 131-134, 139-140.

In closing argument, counsel for petitioner argued that Winn was not credible and that she had everything to gain by lying because she had entered into a plea agreement with the government. Counsel further argued that Winn's evidence was "the best testimony money can buy, for a forty-eight hundred dollar down-payment and fifteen hundred dollars a month"—a reference to Winn's acceptance into the witness protection program and the government's payment of her subsistence. Pet. App. A9. In rebuttal, the prosecutor argued that there was nothing in the plea agreements that required any witness to lie and that the agreements were not "based on the necessity of [the witnesses'] ensuring or doing good enough to convict somebody." *Id.* at A8. To believe otherwise, the prosecutor stated, the jury "would have to believe that the Government of the United States is an active participant with them in that conspiracy." *Id.* at A9.

2. The court of appeals affirmed petitioner's convictions. Pet. App. A1-A10, B1-B2.[3] Although it did "not condone the prosecutor's argument," the court of appeals ruled that his remarks did not constitute improper vouching for the government's witnesses because the rebuttal "was a direct response to and was provoked by defense counsel's argument." *Id.* at A9. The court also concluded that the perjury count, on which petitioner was acquitted, was properly joined with the other counts because the underlying facts of the offenses were "sufficiently related so they can be deemed

---

[3]The court of appeals reversed Alisa Avery's convictions on the ground that the introduction of petitioner's grand jury testimony concerning Alisa Avery's distribution of illegal drugs was barred by *Bruton* v. *United States*, 391 U.S. 123 (1968). Pet. App. A7-A8.

to be part of the same transaction" under Fed. R. Crim. P. 8(b). Pet. App. A6. The court of appeals also determined that no severance was required under Fed. R. Crim. P. 14 because joinder of the perjury count did not prejudice petitioner with respect to the other counts. Pet. App. A6 & n.5. In denying petitioner's petition for rehearing, the court of appeals stated that even if the prosecutor's remarks during rebuttal were improper, the court "would still conclude that any error was harmless." *Id.* at B2.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review of petitioner's factbound claims is unwarranted.

1. Petitioner argues first (Pet. 6-15) that the prosecutor's rebuttal argument denied him a fair trial. The court of appeals determined on the basis of its review of the record that the prosecutor's remarks, even if error, were harmless. Pet. App. B2. This conclusion is plainly correct. The rebuttal represented a fairly limited response to petitioner's counsel's improper suggestion that the government had knowingly purchased perjured testimony. While not commendable, the remarks "did no more than respond substantially in order to 'right the scale,' " and therefore do "not warrant reversing [petitioner's] conviction." *United States* v. *Young*, No. 83-469 (Feb. 20, 1985), slip op. 11 (footnote omitted). Moreover, although most of the testimony against petitioner was provided by Winn and Schneider, it was corroborated by documentary evidence such as proof of Winn's trips to prospective purchasers. In these circumstances, there is no reason to review the court of appeals' conclusion that the error, if any, was harmless. See, *e.g.*, *United States* v. *Bryant*, 770 F.2d 1283, 1291-1292 (5th Cir.

1985); *United States* v. *Swafford,* 766 F.2d 426, 428 (10th Cir. 1985).[4]

Contrary to petitioner's contention (Pet. 6-9), that fact-specific conclusion does not (and indeed by its nature virtually cannot) conflict with the decisions of other courts of appeals that other improper prosecutorial comments were not harmless on different facts. In any event, the cases cited by petitioner involved far more egregious remarks, such as misstatements of the law and references to prior offenses not in the record, and situations where the evidence supporting the defendants' guilt was significantly weaker, such as where an earlier trial had resulted in a hung jury. In *United States* v. *Dorr,* 636 F.2d 117 (5th Cir. 1981), on which petitioner primarily relies, the prosecutor's comments implied that defense counsel was arguing that federal and state judges were involved in a conspiracy to convict the defendant. The court there stated that it "may have found no difficulty with the prosecutor's closing argument" had his comments been confined in a manner similar to those of the prosecutor here. *Id.* at 120.

2. Petitioner also contends (Pet. 16-20) that the perjury count was misjoined under Fed. R. Crim. P. 8(b). He apparently does not dispute the general proposition that perjury counts may be joined with counts charging offenses related to the subject of the perjury, as here. See Pet. 18; see also, *e.g., United States* v. *O'Connell,* 703 F.2d 645, 648-649 (1st Cir. 1983); *United States* v. *Duzac,* 622 F.2d 911, 913 (5th Cir.), cert. denied, 449 U.S. 1012 (1980); *United*

---

[4]Petitioner is clearly wrong in arguing (Pet. 11) that the court of appeals' conclusion that the *Bruton* error with respect to his co-defendant was not harmless mandates a like result as to his claim. Petitioner's acknowledgment of his daughter's guilt—the admission of which the court of appeals found to be erroneous—quite obviously had a more direct impact on the jury's deliberations than the remarks made by the prosecutor concerning the witnesses' plea agreements.

States v. *Jamar*, 561 F.2d 1103, 1105-1106 (4th Cir. 1977). Rather, petitioner contends only that the government's failure to prove the perjury charge at trial mandates reversal. It is well-established, however, that a failure of proof at trial does not, at least in the absence of prosecutorial bad faith (which is not alleged here), retroactively invalidate the initial decision to join offenses. *E.g.*, *Schaffer* v. *United States*, 362 U.S. 511, 513-517 (1960). And in any event, even if the perjury count were misjoined, the error plainly would be harmless in view of the absence of prejudice to petitioner as demonstrated by his acquittal on the perjury count, the district court's limiting instruction, and the fact that his convictions rested on evidence completely independent of that introduced in support of the perjury charge. See Pet. App. A6 & n.5; see generally, *e.g.*, *United States* v. *Bibby*, 752 F.2d 1116, 1122 (6th Cir. 1985), petitions for cert. pending, Nos. 84-1692 and 84-1851; *United States* v. *Seidel*, 620 F.2d 1006, 1009-1011 (4th Cir. 1980).[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

JANIS KOCKRITZ
Attorney

DECEMBER 1985

---

[5]The Eleventh Circuit has treated misjoinder as prejudicial per se. See Pet. App. A5. The question whether misjoinder is subject to the harmless error doctrine is currently pending before the Court in *United States* v. *Lane*, No. 84-744 (argued Oct. 9, 1985).

DOJ-1985-12